Ketua Pengarah Hasil Dalam Negeri v Classic Japan (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(A)-100–02 OF 2021
KAMALUDIN MD SAID, RAVINTHRAN AND NORDIN HASSAN JJCA
9 MARCH 2022

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Revenue Law — Income tax — Allowances — Claim for allowances — Interpretation of rr 3 and 4 of Income Tax (Allowance for Increased Export) Rules 1999 — Literal and ordinary meaning — Whether respondent entitled to claim increased export allowance under the Income Tax (Allowance for Increased Export) Rules 1999 — Whether respondent was company engaged in agriculture, resident in Malaysia, and export agricultural produce — Whether respondent entitled to claim industrial building allowance — Whether respondent's factory was industrial building — Income Tax (Allowance for Increased Export) Rules 1999 rr 2, 3 & 4

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Revenue Law — Income tax — Penalty — Whether Director General of Income Tax was correct in imposing penalty against respondent under s 113(2) of the Income Tax Act 1967 — Income Tax Act 1967 s 113(2)

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The respondent was a company involving in the business of collection, processing, and shipment of cut fresh flowers for export to Japan. In the present case, the appeal (via case stated) by the Director General of Income Tax ('the appellant') at the High Court was against the decision of Special Commissioner of Income Tax ('the SCIT') in allowing the respondent to claim the industrial building allowance whereas the respondent's appeal was against the SCIT's decision in holding that the respondent was not entitled to claim the increased export allowance under the Income Tax (Allowance for Increased Export) Rules 1999 ('the 1999 Rules'); and that the appellant was correct based on law and facts to impose a penalty against the respondent under s 113(2) of the Income Tax Act 1967 ('the ITA'). The High Court had dismissed the appellant's appeal and allowed the respondent's appeal against the decision of the SCIT. The learned judicial commissioner ('the JC') found that: (a) the respondent was entitled to claim the increased export allowance under the 1999 Rules; (b) the respondent's factory was an industrial building and as such, the respondent was entitled to claim the industrial building allowance; and (c) the appellant had no legal or factual basis to impose the penalty under s 113(2) of the ITA ('the JC's decision'). Aggrieved by the JC's decision, the appellant filed the present appeal. The issue in the present appeal was whether

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A the JC's decision was correct in law and fact.

Held, allowing the appellant's appeal in part with costs of RM10,000 to be paid by the respondent to the appellant subject to payment of allocator fee and ordering costs of RM20,000 awarded to respondent at the High Court to be
B vacated:

(1) The language of rr 3 and 4 of the 1999 Rules were unambiguous and should be given its literal and ordinary meaning. Pursuant to r 3, for the respondent to be entitled to the increased exports allowance, the
C respondent must be a company engaged in agriculture, resident in Malaysia, and export agricultural produce. Rule 2 stated that fresh flowers were agriculture produce. The phrase 'engaged in agriculture' was not defined under the 1999 Rules and thus, their ordinary meaning should be given by the court. Based on the dictionary meaning, the
D phrase 'engaged in agriculture' under r 3 clearly had the connotation of involvement in the planting or growing of the fresh flowers, as such, the activity of mere buying of the said flowers from contract flower growers was not an activity within the meaning of the said phrase (see paras 22, 27, 29 & 31).

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(2) In addition, the SCIT had made a finding of fact that the respondent was not engaged in agriculture as envisaged under r 3 of the 1999 Rules. In coming to its decision, the SCIT had considered all the relevant facts and the contention by the respondent on this issue. It was a trite principle of
F law that the findings of facts by the SCIT were unassailable unless the finding was not supported by evidence or SCIT had drawn a wrong inference on the facts. In the present appeal, the court found that the finding of facts by the SCIT was supported by evidence and was reasonable. The SCIT also was not wrong in making inferences on the
G facts. Hence, the JC fell into error in interfering with the finding of facts by the SCIT on this issue. In the present case, the respondent was not engaged in agriculture that entitled the respondent to claim the increased exports allowance under the 1999 Rules (see paras 32–33, 36 & 39).

(3) Based on paras 37C, 63 and 64 of schedule 3 of the ITA, it was clear that
H for the respondent's factory to be categorised as an industrial building, the building must be used for purposes of a business and the housing of machinery or plant of any description for the subjection of goods to any process. Based on the proven facts, the SCIT made its finding that the
I respondent's factory was used to house the machinery to process the flowers bought from the flower growers. Further, the appellant's contention that the respondent's factory was only used for packaging the fresh flowers for purposes of exports was against the proven facts, in particular, para 7.2(iii) of the case stated which stated that the packaging was only part of the process in the respondent's factory. The finding of

facts by the SCIT was supported by proven facts and did not warrant the court's intervention. Therefore, the court agreed with the SCIT and the JC that the respondent's factory was an industrial building that entitled the respondent the industrial building allowance (see paras 41 & 45–48).

(4) What had been established in the present case was that the appellant had made an incorrect return as well as given incorrect information to the appellant. This was sufficient for the appellant to exercise his discretion to impose the said penalty on the respondent. The issue of good faith had no application to the imposition of penalty under s 113(2) of the ITA (see para 53).

[Bahasa Malaysia summary

Responden adalah sebuah syarikat yang terlibat dalam perniagaan pengumpulan, pemprosesan, dan penghantaran bunga yang dipotong segar untuk dieksport ke Jepun. Dalam kes ini, rayuan (melalui kes dinyatakan) oleh Ketua Pengarah Hasil Dalam Negeri ('perayu') di Mahkamah Tinggi adalah terhadap keputusan Pesuruhjaya Khas Cukai Pendapatan ('PKCP') dalam membenarkan responden untuk menuntut elaun bangunan industri manakala rayuan responden adalah terhadap keputusan PKCP yang menyatakan bahawa responden tidak berhak menuntut elaun peningkatan eksport di bawah Kaedah-Kaedah Cukai Pendapatan (Elaun Peningkatan Eksport) 1999 ('Kaedah 1999'); dan bahawa perayu adalah betul berdasarkan undang-undang dan fakta untuk mengenakan penalti terhadap responden di bawah s 113(2) Akta Cukai Pendapatan 1967 ('ACP'). Mahkamah Tinggi telah menolak rayuan perayu dan membenarkan rayuan responden terhadap keputusan PKCP. Pesuruhjaya kehakiman yang bijaksana ('PK') mendapati bahawa: (a) responden berhak menuntut elaun peningkatan eksport di bawah Kaedah 1999; (b) kilang responden adalah bangunan industri dan oleh itu, responden berhak menuntut elaun bangunan industri; dan (c) perayu tidak mempunyai asas undang-undang atau fakta untuk mengenakan penalti di bawah s 113(2) ACP ('keputusan PK'). Terkilan dengan keputusan PK tersebut, perayu memfailkan rayuan semasa. Isu dalam rayuan ini ialah sama ada keputusan PK tersebut adalah betul dari segi undang-undang dan fakta.

Diputuskan, membenarkan sebahagian rayuan perayu dengan kos sebanyak RM10,000 dibayar oleh responden kepada perayu tertakluk kepada bayaran alokator dan membatalkan kos sebanyak RM20,000 yang telah diberikan kepada responden oleh Mahkamah Tinggi:

(1) Bahasa dalam kk 3 dan 4 Kaedah 1999 adalah jelas dan harus diberi makna harfiah dan biasa. Menurut k 3, untuk membolehkan responden layak mendapat elaun peningkatan eksport, responden mestilah syarikat yang terlibat dalam pertanian, bermastautin di Malaysia, dan mengeksport hasil pertanian. Kaedah 2 menyatakan bahawa bunga segar adalah hasil pertanian. Frasa 'engaged in agriculture' tidak ditakrifkan di

bawah Kaedah 1999 dan oleh itu, maksud biasa harus diberikan oleh mahkamah. Berdasarkan maksud di dalam kamus, frasa 'engaged in agriculture' di bawah k 3 jelas mempunyai konotasi penglibatan dalam penanaman bunga segar, oleh itu, aktiviti membeli bunga tersebut daripada kontraktor penanam bunga bukanlah aktiviti yang termasuk dalam maksud frasa tersebut (lihat perenggan 22, 27, 29 & 31).

(2) Di samping itu, PKCP telah membuat dapatan fakta bahawa responden tidak terlibat dalam bidang pertanian seperti yang diperuntukkan di bawah k 3 Kaedah 1999. Dalam membuat keputusan tersebut, PKCP telah mempertimbangkan semua fakta yang berkaitan dan hujahan oleh responden mengenai isu ini. Ia adalah satu prinsip undang-undang yang mantap bahawa dapatan fakta oleh PKCP tidak boleh dipertikaikan melainkan dapatan tersebut tidak disokong oleh keterangan atau PKCP telah membuat kesimpulan yang salah terhadap fakta tersebut. Dalam rayuan semasa, mahkamah mendapati bahawa dapatan fakta oleh PKCP disokong oleh keterangan dan adalah munasabah. PKCP juga tidak salah dalam membuat inferens ke atas fakta. Oleh itu, PK telah terkhilaf dalam mengganggu dapatan fakta oleh PKCP mengenai isu ini. Dalam kes ini, responden tidak terlibat dalam bidang pertanian untuk melayakkan responden menuntut elaun peningkatan eksport di bawah Kaedah 1999 (lihat perenggan 32–33, 36 & 39).

(3) Berdasarkan perenggan-perenggan 37C, 63 dan 64 Jadual 3 ACP, adalah jelas bahawa bagi membolehkan kilang responden dikategorikan sebagai bangunan industri, bangunan tersebut hendaklah digunakan untuk tujuan perniagaan dan penyimpanan apa-apa bentuk jentera atau loji yang melibatkan barang kepada apa-apa proses. Berdasarkan fakta yang dibuktikan, PKCP membuat dapatan bahawa kilang responden digunakan untuk menempatkan jentera memproses bunga yang dibeli daripada penanam bunga. Selanjutnya, dakwaan perayu bahawa kilang responden hanya digunakan untuk membungkus bunga segar untuk tujuan eksport adalah bertentangan dengan fakta yang telah dibuktikan, khususnya, perenggan 7.2(iii) kes dinyatakan yang menyatakan bahawa pembungkusan tersebut hanya sebahagian daripada proses di dalam kilang responden. Dapatan fakta oleh PKCP disokong oleh fakta yang dibuktikan dan tidak mewajarkan campur tangan mahkamah. Oleh itu, mahkamah bersetuju dengan PKCP dan PK bahawa kilang responden adalah bangunan industri yang melayakkan responden untuk menerima elaun bangunan industri (lihat perenggan 41 & 45–48).

(4) Apa yang telah dibuktikan dalam kes ini ialah perayu telah membuat pengisytiharan cukai yang tidak betul serta memberikan maklumat yang tidak betul kepada perayu. Ini sudah memadai untuk perayu menggunakan budi bicaranya untuk mengenakan penalti tersebut ke atas responden. Isu niat baik tidak terpakai untuk pengenaan penalti di

bawah s 113(2) ACP (lihat perenggan 53).] A

Cases referred to

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)
Commissioner of Income-Tax v Benoy Kumar Sahas Roy AIR 1957 SC 768; (1957) SCJ 740; (1957) 2 Mad LJ (SC) 145, SC (refd) B
Continental Choice Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri [2021] 4 MLJ 796, CA (refd)
Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor [2021] 6 MLJ 68, FC (refd) C
Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173; [2012] 4 CLJ 445, FC (refd)
Kilmarnock Equitable Co-operative Society Ltd v IRC (1966) 42 TC 675 (refd)
Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2015] 6 MLJ 612, FC (folld) D
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)
Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] 2 MLJ 120; [2015] 10 CLJ 114, CA (refd)
Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] 6 MLJ 411; [2013] 6 CLJ 1032, HC (refd) E
Tenaga Nasional Bhd v Majlis Daerah Segamat [2022] 2 MLJ 119; [2022] 1 LNS 23, FC (refd)
UN Finance Bhd v Director-General of Inland Revenue [1975] 2 MLJ 224, FC (refd) F

Legislation referred to

Income Tax (Allowance for Increased Export) Rules 1999 (revoked by Income Tax (Exemption) (No 6) Order 2019) rr 2, 3, 3(2)(b), 4, 4(c)
Income Tax Act 1967 ss 113, 113(2), 271(1)(c), Schedule 3, paras 37C, 63, 64, Schedule 5, para 34 G
Local Government Act 1976

Appeal from: Civil Appeal No AA-14–1 of 2019 (High Court, Ipoh) H

Hazlina bt Hussain (Mohamad Asyraf bin Zakaria with her) (Inland Revenue Board of Malaysia) for the appellant.
Nittin Nadkarni (Jason Tan Jia Xin and Chris Toh Pei Roo with him) (Lee Hishamuddin Allen & Gledhill) for the respondent.

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Nordin Hassan JCA:

[1] This is an appeal by the appellant, the Director-General of Income Tax ('the Revenue') against the decision of the High Court on 2 February 2021 in

dismissing the Revenue's appeal and allowing the respondent's appeal against the decision of the Special Commissioner of Income Tax ('SCIT') dated 7 June 2018.

[2] The SCIT had decided as follows:

(a) the respondent was not entitled to claim the increased export allowance under the Income Tax (Allowance for Increased Export) Rules 1999 ('the 1999 Rules');

(b) the respondent's factory is an industrial building as defined under para 63 of Schedule 3, Income Tax Act 1967 ('the ITA 1967') and therefore eligible to claim industrial building allowance; and

(c) the Revenue was correct based on law and facts to impose a penalty against the respondent under s 113(2) of the ITA 1967.

[3] Both the Revenue and the respondent appealed to the High Court against the decision of the SCIT by way of Case Stated pursuant to para 34, Schedule 5 of the ITA 1967. The Revenue appealed against the SCIT's decision in allowing the respondent to claim the industrial building allowance whilst the respondent appealed against the decision on the issues of increased export allowance and the imposition of penalty under s 113(2) of the ITA 1967.

[4] On 2 February 2021, the judicial commissioner of the High Court allowed the respondent's appeal and dismissed the Revenue's appeal. The High Court decided as follows:

(a) the respondent is entitled to claim the increased export allowance;

(b) the respondent's factory is an industrial building and as such, the respondent is entitled to claim the industrial building allowance; and

(c) the Revenue has no legal or factual basis to impose the penalty under s 113(2) of the ITA 1967.

THE BACKGROUND FACTS

The facts as laid down in the case stated essentially are the following:

[5] The respondent, Classic Japan (M) Sdn Bhd was incorporated in Malaysia with a business address at 50B Persiaran Greenhill, 30450, Ipoh Perak. Its principal activity is the collection, processing, and shipment of cut fresh flowers for export to Japan. The respondent is involved in this business since 2006.

[6] In carrying out its business, the respondent bought its fresh flowers from seven contract growers in Cameron Highlands where agreements were entered with them to supply fresh flowers to the respondent.

[7] In addition, the respondent had built a factory in 2006 at Lembah Bertam, Cameron Highlands on rented land from Seng Heng Horticulture Sdn Bhd. In the factory, the processing works with regard to the fresh flowers were carried out which includes its preservation to ensure it meets the standard and quality for export. The process works include inspection, trimming, grading, bunching and cutting, hydration, packaging, and preparation for shipping. The factory also has a cold room where the fresh flowers were kept. The total cost of building the factory was RM1,160,318.

[8] The increased value of the respondent's export of fresh flowers are as follows:

Year Assessment	Increased Export
2007	RM4,753,570
2008	RM2,908,660
2009	RM2,231,552
2010	RM4,470,958

[9] The respondent's capital expenditure for building the factory is as follows:

Year Assessment	Capital Expenditure
2007	RM812,400
2008	RM329,604
2010	RM18,314

[10] The respondent then claimed increased export allowance and the industrial building allowance which its details are as follows:

Year Assessment	Industrial Building Allowance
2007	RM105,612
2008	RM67,221
2009	RM34,260
2010	RM36,641

[11] On 26 July 2011 and 27 July 2011, the Revenue conducted a tax audit on the respondent and as a result, on 10 January 2013, two notices of assessments and an additional notice of assessment were issued to the respondent. The notices are as follows:

A (a) a notice of assessment for the Year Assessment 2008 including the penalty in the sum of RM27,782.58;

(b) a notice of assessment for the Year Assessment 2009 including the penalty in the sum of RM238,157.06; and

B (c) notice of additional assessment for the Year Assessment 2010 including the penalty in the sum of RM257,855.39.

[12] Aggrieved by the decision of the Revenue in issuing the said notices of assessments and additional notice of assessment, the respondent filed an appeal C to the SCIT by filing Form Q on 23 January 2013.

THE ISSUES BEFORE THIS COURT

D **[13]** As alluded to earlier, the issues to be determined by this court are as follows:

(a) whether the decision of the judicial commissioner of the High Court in deciding that the respondent is entitled to claim the increased export allowance under the 1999 Rules was correct in law and facts;

E (b) whether the judicial commissioner was correct in law and facts in deciding that the respondent's factory is an industrial building as defined under para 63 Schedule 3 of the ITA 1967; and

(c) whether the judicial commissioner was correct in law and facts in F deciding that the Revenue has no legal or factual basis to impose the penalty under s 113(2) of the ITA 1967.

Whether the decision of the High Court judge in deciding that the respondent is entitled to claim the increased export allowance under the 1999 Rules was correct in G *law and facts*

[14] In considering this issue, the interpretation of the relevant statutory provisions is pertinent which are rr 3 and 4 of the 1999 Rules.

H **[15]** In interpreting the above taxing statutes, it is instructive to make reference to the often-quoted Federal Court case of *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors* [2015] 6 MLJ 612 where Suriyadi FCJ lucidly explained as follows:

I [43] *A levy is a tax and in this case was created by the Act. It is well settled that the language of a statute imposing a tax, duty, charge, or levy must be strictly construed, and with no intendment permitted. Words must be given their ordinary meaning. Nothing is to be read in, and nothing is to be implied, and once that meaning is clear due regard must be given to them.* Any ambiguity detected must lean in favour of the taxpayer charged with paying the tax, duty, charge, or levy (*Mangin v Inland Revenue*

Commissioner [1971] AC 739; *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64).

[44] *The above general principles of interpreting a tax imposing statute are still woven into the fabric of the principles of construction of taxing provisions despite the introduction of* s 17A of the Interpretation Acts 1948 and 1967. Section 17A of the latter Act enjoins a purposive reading to be undertaken when interpreting a statute; with such statutory backing, a literal and blinkered approach must now compete with the context and purpose of the Act as legislated by Parliament. With a litany of cases in abundance, *it is now well established that taxing statutes like all other statutes must be given a purposive interpretation to fulfill the objective of the statute unless the circumstances demand otherwise.*

[45] In this connection, it is useful to make reference to the decision of the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 where the court spoke of the application of the Ramsay principle emphasising the purposive interpretation of taxing statutes. To make it clearer, we highlight the relevant portion and it reads:

> 29 The *Ramsay case* [1982] AC 300 liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the [2015] 6 MLJ 623 influential speech of Lord Wilberforce. First, (at p 323) on the general approach to construction:
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> What is 'clear words' is to be ascertained upon normal principles: these do not confine the courts to a literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.
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> 30 Secondly (at pp 323–324), on the application of a statutory provision so construed to a composite transaction:
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> > It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.
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> 31 The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ('The capital gains tax was created to operate in the real world, not that of make-belief') and that therefore (p 326): To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is canceled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.
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> 32 The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect; of a number of elements intended to operate together) answered to the statutory description. Of course,

this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however, one approaches the matter, the question is always whether the relevant provision of a statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 at p 320, para 8:

> *The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.*

[46] It is significant to observe that the Federal Court in the case of *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 2 MLJ 1 endorsed the approach in the above *Palm Oil Research Board* case, hence settling the current interpretative position in our country. This court in *Alam Maritim Sdn Bhd* said:

> After tracing the history of how courts treat the interpretation of taxing Acts, culminating with the promulgation of s 17A of the 1948 and 1967 Interpretation Acts and subsequent cases, the purposive approach is here to stay. *The intention of Parliament therefore cannot be discounted even if the matter in the Act pertained to tax issues.*

[47] To wind up the discussion under this heading, the consequential effect of the rapid economic growth in this country, and where megaprojects and joint ventures by Malaysian based companies together with offshore entities are no more a rarity, makes it more imperative that the objective and purpose of the Act be implemented. *This purposive and practical approach will surely assist and fulfill the task of the appellant, together with the levy mechanism to manage, develop and regulate the construction industry, tremendously.* (Emphasis added.)

[16] Hence, the trite principle of law that statute should be interpreted according to its ordinary plain meaning which includes taxing statutes is still applicable as envisaged by the above Federal Court decision. In the *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 case, the same principle was reiterated by Gopal Sri Ram FCJ in the following words:

> ... The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:
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> *First*, *the words are to be given their ordinary meaning*. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
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> *Secondly*, '*... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*' (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue*

Commissioners [1921] 1 KB 64 at 71, approved by *Viscount Simons LC in Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119.

Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[17] At this juncture, it is also useful to make reference to the Federal Court case of *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; [2012] 4 CLJ 445 where the same issue was explained as follows:

[48] A statute is the written will of the legislature. It is the fundamental rule of interpretation of a statute that it should be expounded according to the intent of Parliament. *Courts must use the literal rule where a clear meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning. In the event of the words of the statute being precise and unambiguous in themselves, it is only just necessary to expound those words in their natural and ordinary sense.* (Emphasis added.)

[18] On the same issue, we are of the view that the purposive approach in interpreting a statute including tax statute is only applicable if the statute is ambiguous and the purposive approach taken does not cause any injustice or absurdity.

[19] This court in *Continental Choice Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri* [2021] 4 MLJ 796 cited with approval the conclusion made by the learned High Court judge which is as follows:

[63] At the High Court, the learned judge gave careful consideration to the decision of the Federal Court in *Palm Oil Research and Development Board* case. Having done so, His Lordship concluded as follows:

57 Therefore, it is my view that *the purposive approach is adopted in a situation where the provision in the tax statute does not provide plain and unambiguous language. Section 17A of the Interpretation Acts 1948 and 1967 will only be invoked when it is required by the court to adopt an approach that produces neither injustice or absurdity*. In other words, an approach that promotes the purpose or objects underlying the particular statute albeit that such purpose or object is not expressly set out therein. (Emphasis added.)

[20] Reverting to the issue at hand, r 3 of the 1999 Rules states as follows:

Allowance for increased exports

Subject to rules 4 and 5, where a manufacturing company or *a company engaged in*

agriculture, *resident in Malaysia, exports* manufactured products or *agricultural produce* in the basis period for a year of assessment, *there shall be given to the company an allowance* to be determined in the manner as prescribed in rule 4:

Provided that an exemption on exports of manufactured products is only given to manufacturer.

[21] Next, r 4 of the 1999 Rules provides:

Determination of allowance

The allowance mentioned in *rule 3* refers to —

(a) ...

(b) ...

(c) *10 percent of the value of increased exports of agricultural produce by the company.* (Emphasis added.)

[22] The language of rr 3 and 4 are unambiguous and should be given its literal and ordinary meaning. Thus, pursuant to r 3, for the respondent to be entitled to the increased exports allowance, the respondent must be *a company engaged in agriculture*, *resident in Malaysia,* and *export agricultural produce*.

[23] In this regard, the Revenue contended that for the respondent to be qualified to claim the increased exports allowance under r 3 read with r 4, the agricultural products exported by the respondent must be produced by the respondent. In the instant case, the respondent bought fresh flowers from contract growers, and the flowers were not produced by the respondent. In other words, the respondent must be directly involved with the planting, cultivating, and producing of the said fresh flowers.

[24] Further, it was the Revenue submission that the phrase 'engage in agriculture' brings the meaning of producing the agriculture product from the activity of farming such as crop selection, land preparation, seed selection, irrigation, fertilizers, and harvesting to produce the agriculture product. The phrase 'engage in agriculture' was purposely inserted by Parliament to make the Rules is strictly applicable only to the company that involves directly in agriculture activity.

[25] However, the judicial commissioner of the High Court decided that the respondent was engaged in agriculture based on established facts, particularly a letter from Jabatan Pertanian Cameron Highlands which stated that the respondent was engaged in agriculture, that the 1999 Rules were meant to assist and encourage parties to increase exports of agricultural produce and there being no mention at all in the 1999 Rules that the company claiming the allowance has to do the planting.

[26] In determining this issue, r 3 must be read together with r 4(c) as the determination of the 10% of the increased exports allowance is provided under the said r 4(c). The wordings of rr 3 and 4(c) of the 1999 Rules are plain and need no other interpretation but their literal and ordinary meanings.

[27] Firstly, fresh flowers are agriculture produce as defined under r 2 which is as follows:

> For the purposes of these Rules —
>
> *'agricultural produce'* means fresh and dried fruits, *fresh and dried flowers*, ornamental plants, and ornamental fish.

[28] Reverting to the phrase 'engage in agriculture' under r 3, it must have its significance as it is trite that Parliament does not legislate in vain and every word must bear some meaning. This is explained in a plethora of cases and in a recent Federal Court case of *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] 6 MLJ 68, this is what the court said:

> [187] ... These words *'a substantial body of persons' cannot be disregarded, as there is a presumption that every word in law is to be given meaning, as the drafter does nothing in vain and the court must endeavour to give significance to every word used* (see: *Bennion on Statutory Interpretation* (7th Ed 2017, section 21.2) and the decision of this court in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 at p 737; [2020] 7 CLJ 561; [2020] 4 MLRA 394 at pp 410–411).
>
> *Hence, those words 'substantial body of persons' in art 149 must also be given importance*. Article 149 of the FC directs attention and focus on the activities of persons. That is its restriction. Whereas the NSCA is much wider than that as it is also meant to cover other matters such as disasters and infectious diseases which definitely and undeniably affect national security.(Emphasis added.)

[29] In connection to this, we noted that the phrase 'engaged in agriculture' is not defined under the 1999 Rules and thus, their ordinary meaning should be given by the court. In order to reach the ordinary meaning, resort can be had to the dictionary meaning of the words therein. In the recent Federal Court case of *Tenaga Nasional Bhd v Majlis Daerah Segamat* [2022] 2 MLJ 119; [2022] 1 LNS 23, the court made reference to the dictionary meaning of the words structure, support, and foundation under the Local Government Act 1976. The court explained as follows:

> [70] Before we examine the meaning of these words in the well-known and authoritative dictionaries, perhaps *it will be useful to note that statutory words and phrases are to be understood in their ordinary meaning*; everyday meaning — unless the context indicates that they bear a technical meaning. *The rule is based on the presumption that legislature is most likely to have intended the language to be understood in their ordinary sense* and on the value that people subject to such laws will more

likely comprehend the rights and obligations granted to them. *One of the ways to determine the meaning of a word is to turn to dictionaries as a source of information about the word usage.* (Emphasis added.)

[30] The words *engage* and *agriculture* have dictionary meanings as follows:

Dictionary/Words	Engage	Agriculture
Black's Law Dictionary	To employ or involve oneself, to take part in, to embark on.	The science or art of cultivating soil, harvesting crops, and raising livestock. Agriculture is a broader meaning than 'farming'; and while it includes the preparation of soil, the planting of seeds, the raising, and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, and ranching.
Oxford English Dictionary	Become involved in.	The science or practice of farming, including the growing of crops and the rearing of animals.
The Longman Dictionary of Law (7th Ed)	To be engaged in an occupation is to be occupied therein. It connotes such a degree of employment as occupies the whole or at least a substantial part of the time.	Includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadowland, osier land, market gardens, and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agriculture purposes.
Osborn's Concise Law Dictionary (12th Ed)		Includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping.

Words, Phrases & Maxims — Legally and Judicially Defined (Anandan Krishnan) (Lexis-Nexis)	To employ oneself in.	Agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human labour and skill, 43 MLJ 191. The term 'agriculture' has much wider import than the term 'cultivation'. Consequently, a purpose may be connected with agriculture, such as, grazing on the lands of the holding but not necessarily ancillary to cultivation. Agriculture, in the Board of Agriculture Act 1889 (52 & 53 Vic C 30), s 12, includes horticulture. The ordinary meaning of 'agriculture' is the raising of annual or periodical grain crops through the operation of plowing, sowing, etc. The term 'agriculture' is of wider import than the term 'cultivation'. As is pointed out in the Oxford Dictionary, 'agriculture' means the science or art of cultivating the soil including the allied pursuits of gathering in the crops and rearing livestock; tillage, husbandry, farming (in the widest sense).

A B C D E F G H I

Jowitt's Dictionary of English Law (2nd Ed) by John Burke	–	Includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadowland, osier land, market gardens, and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agriculture purposes.
Judicial Dictionary (14th Ed) by KJ Aiyar	The word 'engaged' would not mean an isolated act or transaction. What it contemplates is that the person carries on the business as a continuous process of purchase, sale, and storage for the sale of the food grains. In order that a person is engaged in the business of purchase and sale of the food-grains, it is necessary to show that he was carrying on business as a continuous process as normal trading activity.	The primary sense in which the term 'agriculture' is understood is 'ager', a field and 'cultural' — cultivation ir the cultivation of field and the term as understood only in that sense, agriculture would be restricted only to the cultivation of the land in the strict sense of the term meaning thereby, tilling of the land, sowing of the seeds, planting and similar operations on the land. (Commissioner of Income-Tax v Benoy Kumar Sahas Roy AIR 1957 SC 768; (1957) SCJ 740; (1957) 2 Mad LJ (SC) 145.) Agriculture is the art or science of cultivating the ground especially in fields including the preparation of soil, the planting of seeds, the raising, and harvesting of crops, management of livestock; village; husbandry, and farming.

[31] Having considered the relevant dictionary meaning as alluded to above, and in light of the present case, the phrase 'engaged in agriculture' under r 3 of

the 1999 Rules, clearly has the connotation of involvement in the planting or growing of the fresh flowers. In other words, the fresh flowers were produced by the respondent and the activity of mere buying of the said flowers from contract flower growers is not an activity within the meaning of the words 'engaged in agriculture' under r 3.

[32] In addition, whether the respondent was engaged in agriculture or otherwise also involved a finding of facts. Here, based on the evidence presented to the SCIT, the SCIT had made a finding of fact that the respondent was not engaged in agriculture as envisaged under r 3 of the 1999 Rules. In coming to its decision, the SCIT had considered all the relevant facts and the contention by the respondent on this issue. The facts considered by the SCIT, inter alia, are as follows:

(a) the respondent was not involved in planting the flowers but bought them from seven contract flower growers at Cameron Highlands. These flower growers were independent growers and not the respondent's employees;

(b) the respondent does not have any land to plant the flowers and relied on the supply of fresh flowers from the contract flower growers based on the written agreement entered between them;

(c) in the terms of the agreement, there is nothing to indicate that the respondent was involved in the agriculture activity;

(d) in the respondent's audited account, it stated that the respondent's main activity is collecting and exporting cut flowers and in its 'cost of sales' made in the respondent's 'Trading and Profit & Loss Account', for Year-End 31 December 2009, 31 December 2008 and 31 December 2007, there was nothing to show that the respondent was involved in any agriculture activity;

(e) the letter from Jabatan Pertanian dated 17 January 2012 which states that the respondent was involved in agriculture could not be accepted in the context of the present case as the maker was not called to explained and to be cross-examined as to whether the statement that the respondent was involved in agriculture was in reference of the 1999 Rules or merely in the context of buying and exporting the fresh flowers; and

(f) the photographs and invoices tendered before the SCIT by the respondent do not show that the respondent was engaged in agriculture activity.

[33] In this regard, it is a trite principle of law that the findings of facts by the SCIT are unassailable unless the finding was not supported by evidence or SCIT has drawn a wrong inference on the facts.

[34] In *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 Lord Diplock said this:

> ... *Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplanted by the High Court itself*; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event, it will be necessary for the case to be remitted to the Commissioners themselves for further findings. (Emphasis added.)

[35] Further, in *UN Finance Bhd v Director-General of Inland Revenue* [1975] 2 MLJ 224, the Federal Court explained:

> It may be trite to say but it will be of use to remind ourselves that *an appellate court in income-tax cases has only a limited function to perform. It is bound by the findings of facts by the Special Commissioners* and set out in the statement of the case, as stressed by Encik Nizar for Revenue before the High Court, relying on the case of *Harrison v Griffiths*, per Lord Reid at p 296:
>
> > Where, as in this case, *the question is a question of fact, that means that the decision of the Commissioners cannot be reviewed by the court. But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene*. The question, in this case, is, therefore, not whether the Commissioners were wrong but whether their decision was unreasonable. (Emphasis added.)

[36] In the circumstances and having considered the available evidence, we are of the view that the finding of facts by the SCIT was supported by evidence and is reasonable. The SCIT also was not wrong in making inferences on the facts. Hence, the judicial commissioner of the High Court fell into error in interfering with the finding of facts by the SCIT on this issue.

[37] The requirement for the respondent to be involved in planting the fresh flowers has been endorsed by the new r 3(2)(b) 2019 where it states:

> (2) The exemption referred to in subparagraph (1) is subject to the following condition:
>
> (b) *the agricultural produce is planted*, reared or caught *by the qualifying company* ... (Emphasis added.)

[38] The respondent's contention that the new r 3(2)(b) only show that the old r 3 is ambiguous and does not require the respondent to be involved in the planting of the fresh flowers is bereft of any merit. The interpretation of r 3 as discussed above, particularly the phrase *engaged in agriculture* clearly showed

that it requires direct involvement such as planting the said flowers. A

[39] Therefore, in the instant case, it is our view that the respondent was not engaged in agriculture that entitled the respondent to claim the increased exports allowance under the 1999 Rules. B

Whether the High Court judge was correct in law and facts in deciding that the respondent's factory is an industrial building as defined under para 63 Schedule 3 of the ITA 1967 C

[40] On this issue, the relevant statutes for consideration of this court are as follows:

(a) para 63, Schedule 3 of the ITA 1967:

> 63 Subject to paragraphs 64 to 66, a building is an industrial building within the meaning of this Schedule if it is used for the purposes of a business and — D
>
> (a) it is used as a *factory*;
>
> ...

(b) para 64, Schedule 3 of the ITA 1967: E

> 64 In subparagraph 63(a) *'factory'* includes —
>
> (a) a building consisting of a mill, workshop (other than a workshop used for the repair or servicing of goods, if the repair or servicing is carried out in conjunction with or incidentally to the business of selling those goods) *or other building for the housing of machinery or plant of any description for the manufacture of any product or the subjection of goods or materials to any process or the generating of power used for the purposes of that manufacture or process*; and F
>
> (b) a building (within the same curtilage as a building which is used as a factory) used for the storage of any raw material, fuel, or stores necessary for the manufacture of that product or the processing of those goods or materials, or *for the storage of that product or those goods or materials when processed prior to the sale thereof.* (Emphasis added.) G

H

(c) para 37C, Schedule 3 of the ITA 1967:

> 37C The provisions of this Schedule relating to industrial building shall apply mutatis mutandis, to a building or part thereof used by a person *solely for the purpose of storage of goods for export* or for the storage of imported goods which are to be processed and distributed or re-exported and there shall be substituted for the amount of the allowance which would otherwise fall to be made to him under paragraph 12 or 16 an allowance of an amount equal to one-tenth of the qualifying expenditure for that year and for each of the nine following years of assessment. (Emphasis added.) I

[41] Having analysed the relevant provisions mentioned above, it is clear that in order for the respondent's factory to be categorised as an industrial building, the building is used for purposes of a business and it is also used for the housing of machinery or plant of any description for the subjection of goods to any process.

[42] The Revenue submitted that the respondent had failed to establish that the respondent's factory was used for the housing of machinery or plant for the subjection of goods to any process. In essence, the Revenue contended that there was no activity that can be considered as a process in the respondent's factory. The Revenue is of the view that the respondent's factory only carried out the activity of packaging and does not produce something by changing the shape of the fresh flowers.

[43] On this issue, both the SCIT and the judicial commissioner of the High Court decided that the respondent's factory is an industrial building as defined under paras 63 and 64, Schedule 3 of the ITA 1967.

[44] In this regard, it is pertinent to peruse the relevant proven facts in the case stated which are as follows:

7.2 *Fakta Yang Dibuktikan*

(i) Perayu terlibat dalam mengumpul, memproses dan penghantaran bunga segar sejak 2006.

...

(ii) Menurut AW1 bagi aktiviti pemprosesan pula melibatkan 7 peringkat iaitu, pemeriksaan (inspection), pemangkasan (trimming), penggredan (grading), menyatu dan memotong (bunching and cutting), penghidratan (hydration), membungkus (packing), dan penghantaran (shipping).

...

(iii) Bagi setiap aktiviti pemprosesan bunga iaitu, pemeriksaan (inspection), pemangkasan (trimming), penggredan (grading), menyatu dan memotong (bunching and cutting), penghidratan (hydration), membungkus (packing), dan penghantaran (shipping) dilaksanakan di kilang Perayu.

...

(iv) Perayu memerlukan kilang bagi menggendalikan perniagaan eksportnya. Kilang tersebut adalah bagi kerja memproses dan menyimpan bunga segar bagi memenuhi standard dan kualiti eksport.

...

(v) Pada masa yang material, kilang Perayu merupakan bangunan 2 tingkat yang terdiri dari:

...

(vi) Bilik sejuk;

(vii) Kawasan memproses;

(viii) Setiap bunga yang diterima akan melalui proses yang sama iaitu:

(ix) Pemeriksaan, menggred, batang bunga dipotong untuk memastikan saiz, berat dan kualiti yang sama;

(x) Kesemua bunga tersebut akan dirawat dengan bahan kimia khas dari jepun yang dikenali sebagai pulse solution and hydration solution bagi memastikan bunga tersebut kekal segar sepanjang perjalanan ke Jepun.

(xi) Perayu menyimpan semua bunga segar di dalam bilik sejuk di kilangnya.

...

(xii) Pembungkusan bunga hanya sebahagian aktiviti pemprosesan Perayu. Pembungkusan adalah proses yang sangat penting kerana bunga yang tidak dibungkus dengan betul tidak dapat bertahan hingga ke Jepun.

[45] Based on the proven facts, the SCIT made its finding that the respondent's factory is used to house the machinery to process the flowers bought from the flower growers. At *para 10:22* of the case stated states:

10.22 *Bangunan kilang perayu digunakan untuk perniagaan* dan *bangunan tersebut digunakan untuk menempatkan mesin untuk memproses bunga yang dibeli dari penanam kontrak*. Berdasarkan fakta yang dibuktikan jelas menunjukkan bahawa perayu telah menerima bunga segar dari penanam kontrak di kilang mereka dan *melaksanakan beberapa proses seperti penggredan dari segi saiz, panjang, berat, pemangkasan daun, pembersihan dari makhluk perosak, merawat* bunga tersebut mengunakan cecair khas dan pembungkusan. *Kesemua langkah yang dilaksanakan oleh Perayu ke atas bunga segar yang dibeli dari penanam kontrak merupakan proses tersendiri yang dilalui oleh bunga segar tersebut demi menghasilkan produk bunga segar yang memenuhi standard eksport yang ditetapkan oleh Perayu.* (Emphasis added.)

[46] The Revenue's contention that the respondent's factory is only used for packaging the fresh flowers for purposes of exports is against the proven facts, in particular, para 7.2(liii) which states that the packaging is only part of the process in the respondent's factory.

[47] On the same issue, it is useful to refer to the case of *Kilmarnock Equitable Co-operative Society Ltd v IRC* (1966) 42 TC 675 cited by the respondent. In that case, the issue is similar to the present case as to whether the appellant's factory is an industrial building under s 271(1)(c) of the Income Tax Act 1952 which provides:

Building or structure in use for the purpose of a trade which consists in the manufacture of goods or materials or *the subjection of goods* or materials *to any process*.

The appellant's factory was built as a coal depot and in the factory, the coal is deposited in a hopper near the roof of the building which then fed down a

shute through a vibrator screen where dross is removed. The coal is then passed by the conveyor belt to the weighing point where it is filled into paper packets.

Lord Clyde in that case, having considered the activity in the factory, concluded that the appellant's factory is an industrial building. In his judgment His Lordship opined as follows:

> In my opinion, the breaking of bulk coupled with the separating out of the dross by screening and subsequent packaging of the coal into paper bags involves *a 'process'* within the meaning of Section 271(1)(c). (Emphasis added.)

[48] Likewise in the present case, the activity in the respondent's factory which includes inspection, trimming, grading, bunching and cutting, hydration, packaging, and shipping certainly involves a process.

[49] Here, we find that the finding of facts on this issue by the SCIT was supported by proven facts and does not warrant our intervention. As such, we agree with both the SCIT and the judicial commissioner of the High Court that the respondent's factory is an industrial building that entitled the respondent the industrial building allowance.

Whether the High Court judge was correct in law and facts in deciding that the Revenue has no legal or factual basis to impose the penalty under s 113(2) of the ITA 1967

[50] The judicial commissioner of the High Court decided that the imposition of penalty by the Revenue was not supported by facts and law. His Lordship was of the view that good faith on the part of the respondent must be considered in the imposition of the penalty by the Director-General of Income Tax under s 113(2) of the ITA 1967.

[51] Section 113 of the ITA 1967 states:

> 113 Incorrect returns
>
> (1) Any person who —
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been

undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct. A

(2) Where a person—

(a) *makes an incorrect return by omitting or understating any income* of which he is required by this Act to make a return on behalf of himself or another person; or B

(b) *gives any incorrect information in relation to any matter affecting his own chargeability to tax* or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, *the Director-General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct;* and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1). (Emphasis added.) C D

[52] Pursuant to the provision of sub-s 113(2) referred above, the discretion is given to the Director-General of the Income Tax to impose a penalty equal to the amount of tax to any person who makes an incorrect return or gives incorrect information in his tax return. In the instant case, upon the tax audit conducted on the respondent on 26 July 2011 and 27 July 2011, it was found that the respondent had failed to declare its income correctly and gave incorrect information. This is supported by the finding of the SCIT where the respondent was not entitled to the increased exports allowance which this court also agrees. The Director General then imposed a penalty of 45% of the tax which is undercharged instead of 100% allowable under the law. E F

[53] What had been established in the instant case was that the appellant had made an incorrect return as well as given incorrect information to the Revenue. This is sufficient for the Director General to exercise his discretion to impose the said penalty on the respondent. The issue of good faith has no application with regard to the imposition of penalty under s 113(2). G H

[54] At this juncture, it is appropriate to refer to the relevant authorities on this issue. This court in *Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017] 2 MLJ 120; [2015] 10 CLJ 114, explained the penalty's provision under s 113 of the ITA 1967 in the following words: I

[40] *It is without doubt that s 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para 2(a) or (b) of s 113.* Hence the use of the phrase 'the Director-General may require that person to pay a penalty'. There is a clear

distinction between sub-s 113(1) and sub-s 113(2). Although paras 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of sub-s 113(1) is different from sub-s 113(2). Subsection 113(1) provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in good faith'. *Whereas sub-s 113(2) provides for a situation where there is no prosecution under sub-s 113(1) has been instituted in the circumstances provided for in para 113(2)(a) or (b), the Director-General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s 113(1), and not found in sub-s 113(2), does not apply to the Director General's discretion under sub-s 113(2).* We, therefore disagree with the appellant's submission on this score. (Emphasis added.)

[55] In *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 6 MLJ 411; [2013] 6 CLJ 1032, this is what was said by Rohana J (as Her Ladyship was, now PCA):

> [46] Under s 113(1) when a person makes incorrect returns or gives incorrect information he can be guilty of an offence and be liable to a fine and special penalty double the undercharged tax consequential to that incorrect returns or information. A defence of good faith is provided under s 113(1) of the ITA. Section 113(2) would operate only if there is no prosecution made under s 113(1). *Thus, for the same wrong, that is, making incorrect returns or wrongful information, a person who is not charged under s 113(1) can be imposed with penalty under s 113(2). Reading the two provisions quite obviously it is implied this provision operates with or without bad faith.* The Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708; [1992] 4 CLJ 2079; [1992] 1 CLJ Rep 135 explained that the objective of assessment of tax contemplates filling of correct returns by the taxpayer. *Filling incorrect returns attracts a penalty under s 113(2) of the ITA.* The court, in that case, held that this provision vested discretion in the revenue board, a discretion that cannot be exercised at whim and fancy.
>
> [47] The evidence in this case shows that the revenue board became aware of the RM18,000,000 claimed as deduction only upon auditing. Not for the auditing, the respondent would not be aware that the deductible rental should be lesser instead. The appellant therefore would be paying less tax. The contention by the appellant that it was made in good faith due to the differing interpretation of the law cannot hold because ignorance of the law cannot be a defence.
>
> [48] *This country is now adopting a self-assessment regime. Thus, in line with the present policy where submission of returns are based on self-assessment by the taxpayer, a taxpayer must be mindful of his responsibility to submit correct returns and must necessarily do so upon necessary consultation to ensure correct returns are submitted.* (Emphasis added.)

[56] Having considered the facts and the applicable law on this issue, we find the Director General of the Income Tax had exercised his discretion correctly pursuant to s 113(2) of the ITA 1967. The judicial commissioner erred when His Lordship decided that the element of good faith should be considered by the SCIT and the imposition of penalty was not supported by facts and law.

CONCLUSION

[57] Based on the aforesaid reasons, the Revenue's appeal is allowed in part as follows:

(a) the Revenue's appeal against the decision of the judicial commissioner of the High Court that the respondent is entitled to the increased exports allowance is allowed;

(b) the Revenue's appeal against the decision of the judicial commissioner that the respondent is entitled to the industrial building allowance is dismissed; and

(c) the Revenue's appeal against the judicial commissioner's decision that the imposition of the penalty against the respondent was without a factual and legal basis is allowed.

[58] We also order the respondent to pay costs of RM10,000 to the Revenue and costs is subject to payment of allocator fee. The costs of RM20,000 awarded to the respondent at the High Court is to be vacated.

Appellant's appeal allowed in part with costs of RM10,000 to be paid by respondent to appellant subject to payment of allocator fee; costs of RM20,000 awarded to respondent at High Court was vacated.

Reported by Dzulqarnain Ab Fatar